



February 15, 2000

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2000-0546

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132193.

The Texas Department of Criminal Justice (the "TDCJ") received a request for information concerning TDCJ's Request for Proposals Number 696-PS-9-018 regarding SAFPF programs. Specifically, the requestor asked for a copy of Gateway Foundation's ("Gateway") proposal, evaluator comments, and evaluator scores. In regard to TDCJ's evaluation comments and scores, you claim on behalf of TDCJ that this information is excepted under section 552.111 of the Government Code. In regard to Gateway's proposal materials, you claim on behalf of Gateway that all or part of Gateway's proposal materials is excepted under section 552.110 of the Government Code. In accordance with section 552.305 of the Government Code, you have notified Gateway of the request. Gateway has responded stating that portions of its proposal materials are excepted under sections 552.101 and 552.110 of the Government Code. We have reviewed TDCJ's and Gateway's arguments and reviewed the submitted information.

As a preliminary matter, we address the significance of a letter dated December 1, 1999 and sent to you by Mr. Ace Pickens. In the letter, Mr. Pickens states: "On behalf of Gateway Foundation, we would respectfully ask that you request of the Attorney General an opinion relating to the remaining issues not fully addressed in OR99-3085." The letter-ruling referred to in Mr. Pickens' letter dealt with a request to TDCJ for Gateway's and CiviGenics' submitted proposals regarding TDCJ's Request for Proposals Number 696-PS-9-P-018. The information submitted by Gateway that was at issue in Open Records Letter No. 99-3085 (1999) is the same information that is now at issue in regard to the current open records request.

In response to the request discussed in Open Records Letter No. 99-3085, Gateway argued that its submitted materials were excepted from required public disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. In Open Records Letter No. 99-3085, we found that the requested information was excepted under section 552.104 because at that time, the bidding process was still in process and therefore still competitive. Open Records Letter No. 99-3085 at 1-2. We noted, however, that “once a contract has been executed and the competitive bidding process is completed, you [TDCJ] may not continue to withhold this information under section 552.104. *See* Open Records Decision No. 541 (1990).” Because section 552.104 was dispositive of the matter, Open Records Letter No. 99-3085 did not address Gateway’s arguments regarding sections 552.101 and 552.110.

We interpret Mr. Pickens’ letter of December 1, 1999 to be Gateway’s response to the current request. In other words, Mr. Pickens’ letter raises Gateway’s previous arguments regarding sections 552.101 and 552.110 to the information that is currently at issue.¹

We turn to Gateway’s contention that all or some of the requested information is excepted under section 552.101 of the Government Code. Although Gateway has raised that exception, it has not explained its applicability to the submitted information. Accordingly, we conclude that TDCJ may not withhold any information under this exception.

Next, we consider Gateway’s contention that pages 3-48 and 50-105 of its proposal are excepted under the first prong of section 552.110 as a “trade secret.” Section 552.110(a) provides:

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.

Gov’t Code § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or

¹Because the current request only asks for proposal information submitted by Gateway, we do not consider the submitted information pertaining to CiviGenics’ proposal to be responsive to the current request. Therefore, this ruling only addresses Gateway’s proposal materials and the evaluation materials.

preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979).

If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private party’s claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990). However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). Having reviewed Gateway’s arguments and the

information at issue, we conclude that Gateway has not made a *prima facie* case that the information is protected under the trade secret aspect of section 552.110. Therefore, TDCJ may not withhold any of the submitted information under section 552.110(a).

Next, we consider Gateway's arguments under the financial or commercial information prong of section 552.110. Section 552.110(b) states:

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

Gov't Code § 552.110(b). The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Gateway has only identified pages 3-48 and 50-105 of its proposal as information that it claims is excepted under section 552.110(b). We have reviewed this information as well as Gateway's arguments and find that Gateway has not adequately shown that this information falls under section 552.110(b). Therefore, TDCJ may not withhold any of the submitted information under section 552.110.

You have expressed concern that at least some of Gateway's proposal material may be copyrighted. Therefore, we note that a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

Finally, we consider TDCJ's evaluation comments and scores. The Seventy-sixth Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Gov't Code § 552.022. Section 552.022 now states in relevant part:

(b) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022(a). One such category of expressly public information under section 552.022(a) is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" Gov't Code § 552.022(a)(1). You state that the submitted evaluation materials were created as part of an evaluation procedure which resulted in TDCJ's selection of vendors and "the execution of all contracts." We understand this to mean that the submitted evaluation materials constitute a completed evaluation which implicates section 552.022(a)(1).

You argue that the evaluation materials are excepted under section 552.111. However, section 552.111 is an exception under the Public Information Act and is, therefore, not "other law" that makes the evaluation materials confidential. *See* Gov't Code § 552.022(a). Moreover, we know of no other law that would make the evaluation materials confidential. Therefore, as prescribed by section 552.022(a)(1), the requested evaluation materials must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

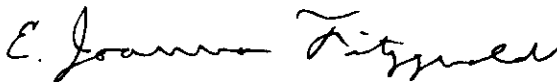
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "E. Joanna Fitzgerald".

E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\nc

Ref: ID#132193

Encl: Submitted documents

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